(25)

No. 03-339

FEB 27 2004

IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PRESBYTERIAN CHURCH OF SUDAN AND CLIFTON KIRKPATRICK AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.) AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

LAWRENCE KILL
LINDA GERSTEL
ANDERSON KILL & OLICK, P.C.
1251 Avenue of the Americas
New York, NY 10020
(212) 278-1000

CAREY R. D'AVINO*
STEPHEN A. WHINSTON
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

* *Counsel of Record*

Counsel for Amici Curiae

186049

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	8
I. The ATCA Applies to Narrow and Discrete Categories of Claims Which Are Specific, Universal and Obligatory	8
II. The Courts Typically Construe the ATCA Narrowly and Limit its Application to Universally Recognized Violations of International Law	13
III. Federal Courts Provide a Forum Where No Independent Judiciary Exists To Adjudicate Egregious Violations of International Law ...	21
CONCLUSION	23

TABLE OF CITED AUTHORITIES

Page

CASES

Abebe-Jira v. Negewo,
72 F.3d 844 (11th Cir. 1996), *cert. denied*,
519 U.S. 830 (1996). 15, 20

Aldana v. fresh Del Monte Produce, Inc.,
2003 U.S. Dist. LEXIS 24343 (S.D. Fl. Dec. 12,
2003) 20

Alvarez-Machain v. United States, et al.,
331 F.3d 604 (9th Cir. 2003) 12

First Nat. City Bank v. Banco National de Cuba,
406 U.S. 759 (1972) 19

Banco Nacional de Cuba v. Sabbatino,
376 U.S. 398 (1964) 19

Beanal v. Freeport-McMoran, Inc.,
197 F.3d 161 (5 Cir. 1999) 20

Bigio v. Coca-Cola Co.,
239 F.3d 440 (2d Cir. 2000) 20

Burger-Fisher v. DeGussa AG,
65 F. Supp. 2d 248 (D. N.J. 1999) 19

Dardana Ltd. v. A.O. Yuganskneftegaz,
317 F.3d 202 (2d Cir. 2003) 19

Deutsch v. Turner Corp.,
__ F.3d 692 (9th Cir. 2003), *cert. denied*,
124 S. Ct. 105 (2003) 18

Page

Filartiga v. Pena-Irala,
630 F.2d 876 (2d Cir. 1980) 13

First Nat. City Bank v. Banco National de Cuba,
406 U.S. 759 (1972) 19

Flores v. Southern Peru Copper Corp.,
253 F. Supp. 2d 510 (S.D.N.Y. 2002), *affirmed*,
343 F.3d 140 (2d Cir. 2003) 18, 20

Guinto v. Marcos,
654 F. Supp. 276 (S.D. Cal. 1986) 20

Hilao v. Estate of Marcos,
25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S.
1126 (1995) 9, 10, 15

In Argentine Republic v. Amerada Hess
Shipping Corp.,
488 U.S. 428 (1989) 18

In re: Nazi Era Cases Against German
Defendants Litigation,
129 F. Supp. 2d 370 (D. N.J. 2001) 19

Iwanowa v. Ford Motor Co.,
67 F. Supp. 2d 424 (D.N.J. 1999) 14, 15

Jota v. Texaco, Inc.,
157 F.3d 153 (2d Cir. 1998) 21

Page

Kadic v. Karadzic,
70 F.3d 232 (2d Cir. 1995), *cert denied*, 518 U.S. 1005 (1996) 8, 10, 13, 21

Presbyterian Church of Sudan v. Talisman Energy Inc.,
244 F. Supp.2d 289 (S.D.N.Y. 2003) ..... *passim*

Sarei v. Rio Tinto PLC,
221 F. Supp. 2d 1116 (C.D. Cal. 2002) 19

Toys "R" Us, Inc. v. Step Two, S.A.,
318 F.3d 446 (3d Cir. 2003) 19

Trajano v. Marcos,
1989 WL 76894, *2 (9th Cir. July 10, 1989) 19

Trop v. Dulles,
356 U.S. 86 (1958) 13

Wiwa v. Royal Dutch Petroleum Co.,
226 F.3d 88 (2d Cir. 2000), *cert denied*, 532 U.S. 941 (2001) ..... *passim*

World Tankers Carriers Corp. v. My Ya Mawlaya,
99 F.3d 717 (5th Cir. 1996) 19

Page

STATUTES

Act to Establish the Judicial Courts of the United States,
Ch. 20, 39, 1 Stat. 73 (1789)
(the "First Judiciary Act") 3

Alien Tort Claims Act
28 U.S.C. § 1350 ..... *passim*

Foreign Sovereign Immunities Act,
29 U.S.C. § 1602 ..... 1, 18

International Emergency Economic Powers Act,
50 U.S.C. §§ 1701-1706 1

International Religious Freedom Act of 1998,
22 U.S.C. § 6442 ..... 5, 7, 10, 11

Sudan Peace Act,
50 U.S.C. § 1701 12

Torture Victim Protection Act,
28 U.S.C. § 1350 (note) 3, 14

RULE

F.R.C.P. 4(k)(2) 19

INTEREST OF THE AMICI CURIAE[1]

The Presbyterian Church of the Sudan ("PCOS") is an unincorporated association of more than 35,000 members of the Presbyterian faith. The PCOS came into existence in 1902 through the work of missionaries of the Presbyterian Church (U.S.A.) in Sudan's Upper Nile Province. The PCOS is divided into congregations or parishes, all subject to the Presbytery, which is a ruling body that consists of a representative from each congregation. The PCOS is a member of the World Council of Churches, World Alliance of Reformed Churches, Sudan Council of Churches, and the All-Africa Council of Churches.

The PCOS is a plaintiff in a putative class action brought under 28 U.S.C. § 1350, the Alien Tort Claims Act ("ATCA") against Talisman Energy, Inc., a Canadian oil company doing business in the United States directly or through a wholly owned-subsidiary. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp.2d 289 (S.D.N.Y. 2003).[2] There, plaintiffs allege that Talisman, together with the fundamentalist Islamic government of Sudan, one of seven states declared to be state sponsors of terrorism by the U.S. State Department[3], collaborated to commit gross violations of customary international law including, genocide, war crimes, extrajudicial murder, forcible

1. No counsel for any party authored this brief either in whole or in part, and no person other than *amici curiae*, their counsel and their members made any monetary contribution to its preparation or submission. Supreme Court Rule 37 (6). The written consents of the parties to the filing of this brief have been filed with the Clerk.

2. In that case, plaintiffs also bring a claim against the Republic of Sudan under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, *et seq*.

3. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706.

displacement, torture, and other crimes against humanity as part of a security strategy to create a *cordon sanitaire* around the oil concessions in southern Sudan. Churches, congregations and ministers are alleged to be particular targets of these criminal acts.

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2.5 million members in more than 11,200 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. It is organized through an ascending series of organizations known as church sessions, presbyteries, synods, and, ultimately, a general assembly. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. Since 1833, PC (U.S.A.) has been in mission service around the world. Missionaries of the PC (U.S.A.) founded the Presbyterian Church of Sudan and other Presbyterian churches around the world. This brief is consistent with the policies adopted by the General Assembly regarding religious freedom, human rights, and due process. It is also consistent with the General Assembly intent to support its sister denominations around the world.[4]

Non-U.S. victims of piracy, genocide, war crimes, extrajudicial murder, torture and other violations of customary international law have sought redress in U.S. federal courts for more than 200 years. The lower courts have

4. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

recognized that in the typical ATCA case it is difficult for victims to receive a fair or impartial hearing in the state which has perpetrated or sanctioned such abuses.[5] Accordingly, the continued vitality of the ATCA to provide due process and a level playing field to all parties in disputes alleging violations of specific, universal and obligatory norms of international law is of vital interest to *amici*. Otherwise, victims of the most virulent abuses of customary international law, which are often manifest in the form of widespread and systematic religious persecution, e.g., the Holocaust, would be left with no recourse.

SUMMARY OF ARGUMENT

Petitioner's *sui generis* argument is unsupported by any judicial authority construing 28 U.S.C. §1350, and in an area of paramount concern to *amici* extends far beyond challenging the specific decision in this case. The legal arguments and precedents supporting the use of the ATCA as both a jurisdictional statute and as providing a substantive cause of action are overwhelming. Enacted in 1789 as part of the First Judiciary Act, the Alien Tort Claims Act provides: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[6] Since 1795, the Attorney General of the United States has recognized that this grant of common law jurisdiction was sufficient to vest federal courts with the power to hear tort claims brought by non-U.S. persons, when the tort was

5. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

6. Act to Establish the Judicial Courts of the United States, ch. 20, 39, 1 Stat. 73, 76-77 (1789)(the "First Judiciary Act").

committed in violation of the law of nations, or customary international law.[7]

Since its enactment the ATCA has been construed and applied by the courts in conformity with traditional American legal principles and United States foreign policy interests. Indeed, cases which go beyond the narrow confines of customary international law or which impermissibly intrude on American foreign policy have been routinely dismissed. Contrary to the position taken by Petitioner and supporting amici litigation under the ATCA is rare and lower courts have interpreted the statute in a manner consistent with its language and intent.

Universal religious freedom is the principal touchstone of American pluralism.[8] The United States Constitution

7. In 1795 the U.S. Attorney General was asked to consider the potential liability of U.S. citizens who had aided the French in attacking the British colony in Sierra Leone. The opinion, only six years removed from the adoption of the First Judiciary Act, reveals that the First Congress understood that torts in violation of the law of nations would be cognizable at common law, just as any other tort would be:

> . . . there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.

1 *Op. Att'y Gen.* 57, 59 (1795) (emphasis in original). *See also* 26 *Op. Att'y Gen.* 250, 253, (1907) ("I repeat that the statutes thus provide a forum and a right of action.") We respectfully refer the Court to Respondents' brief which contains substantial lower court authority which we do not repeat here, in deference to the rules of the Court.

8. Our nations's founders fled from religious persecution in search of a land where they could freely exercise (Cont'd)

reserves to the individual the right to practice his or her religion freely and religious tolerance is a key value in the American social matrix. The suggestion by Petitioner, that U.S. law should be interpreted to immunize perpetrators of international religious persecution who have committed genocide, war crimes, torture and slavery is a grave affront to civilized notions of the rule of law in the United States, contrary to the intent of Congress and inconsistent with the foreign policy of the United States.

Promoting and protecting international religious freedom is a key aspect of U.S. foreign policy. The United States Department of State publishes an Annual Report on International Religious Freedom which is compiled through the office of the U.S. Ambassador-at-Large for Religious Freedom. According to Secretary of State Colin Powell, the purpose of the 2002 report was to "serve as a basis for discussions with other nations on how best we can work

(Cont'd)

> their ideal of religious freedom. They stood recognizing that the supression of their faith was tyranny over their hearts and minds. They knew that without the freedom to gather, to worship, to speak about their God, there would be no freedom. So they laid the cornerstone for our democracy, establishing freedom in law. And from that day, the protection of religious freedom has become part of our legacy, part of our identity as a nation.

144 CONG. REC. S12095 (daily ed. Oct. 9, 1998) (statement of Sen. Hutchinson) International Religious Freedom Act of 1998, 22 U.S.C. §§ 6401 (1998). The Act created the United States Commission on International Religious Freedom, an Ambassador at Large for International Religious Freedom in the State Department, and a Special Adviser on International Religious Freedom for the National Security Council.

together to end violations of this fundamental human right and how to advance religious liberty around the globe."[9]

The U.S. State Department's "International Religious Freedom Report" dated December 18, 2003 highlights the importance of international religious freedom in U.S. foreign policy:

> Americans have long cherished their own religious freedom. More recently, they have also come to cherish their government's advocacy for those millions around the world who suffer persecution for their religious beliefs. President Bush has time and again affirmed the signature priority that advancing religious liberty holds for our nation. From his National Security Strategy's declaration that "We will... take special efforts to promote freedom of religion and conscience and defend it from encroachment by repressive governments" to his conviction that "successful societies guarantee religious liberty– the right to serve and honor God without fear of persecution," he has made clear that religious freedom holds an integral place in American foreign policy.

U.S. Department of State, International Religious Freedom Report, p. 1.[10]

Congress has joined the Executive branch in recognizing America's interest in international religious freedom. In 1998 Congress established the United States Commission on International Religious Freedom ("USCIRF") to monitor and

9. United States Commission for International Religious Freedom, 2003 Report, at 57, available at *http://www.uscirf.gov/reports/02May03/finalReport.php3* (last visited Feb. 25, 2004).

10. Available at *http://www.state.gov/g/drl/rls/irf/2003* (last visited Feb. 18, 2004).

promote religious freedom abroad: "Religious freedom is a fundamental right of every individual, regardless of race, sex, country, creed, or nationality and should never be arbitrarily abridged by any government."[11] In the words of the Commission "By providing reliable information, analysis, and careful and creative policy recommendations, the Commission gives the U.S. government and the American public the tools necessary to promote religious freedom throughout the world."[12]

From our unique perspective as religious organizations with world-wide interests, *amici* believes that the ATCA provides a much needed legal response to the rising tide of violent religious persecution in the world today. Most ATCA plaintiffs are citizens of countries ruled by violent, repressive dictatorships with no constitutional guarantees of due process

11. International Religious Freedom Act of 1998, 22 U.S.C. §§ 6401 (1998). The legislative history of the International Religious Freedom Act evinces Congress' intention to make the safeguarding of international religious freedom a cornerstone of U.S. foreign policy. "Passage of the pending legislation will signal to the world that the Congress stands fully behind all efforts to promote religious freedom along with other fundamental human rights as a core component in the United States foreign policy agenda." 144 CONG. REC. S12093 (daily ed. Oct. 9, 1998) (statement of Sen. Dodd);

> Mr. President, the International Religious Freedom Act of 1998 represents a vitally important piece of legislation to raise awareness of and combat religious persecution overseas. Some would downplay the problem of religious persecution abroad, but preserving religious freedom at home and promoting it in other countries is central to the purpose and objectives of the United States.

144 CONG. REC. S12093 (daily ed. Oct. 9, 1998) (Statement of Sen. Ashcroft).

12. United States Commission for International Religious Freedom, 2003 Report, at 1, available at *http://www.uscirf.gov/reports/02May03/finalReport.php3* (last visited Feb. 25, 2004).

and no independent judiciary. The federal courts are the only viable forum these plaintiffs have to redress their claims. *Amici* do not believe this is the time for the Court to sanction complicity with violent, repressive dictatorships by rolling back legislative safeguards that punish and deter universally condemned acts of international religious persecution.

The ATCA provides an impartial mechanism under which victims of certain human rights abuses may seek meaningful compensation from culpable private actors. The ATCA reinforces America's fundamental foreign policy goal of advancing international religious freedom by: 1) providing a federal judicial forum for redressing violations of customary international law that often accompany religious persecution, 2) denying sanctuary to *hostis humani generis*, perpetrators of genocide, war crimes, extrajudicial murder, slavery, torture and other crimes against humanity, and 3) deterring those who would act in violation of customary international law. Respectfully, *amici* urge that the decision below be affirmed.

ARGUMENT

I. *The ATCA Applies to Narrow and Discrete Categories of Claims Which Are Specific, Universal and Obligatory.*

The ATCA, as interpreted by the lower courts, authorizes only a very narrow category of claims in its invocation of "the law of nations," principally genocide, war crimes, extrajudicial murder, slavery, torture and other crimes against humanity. The universal condemnation of these offenses in treaties and other international agreements elevates them to the highest level of sanctionable conduct. These limited offenses violate "well-established, universally recognized norms of international law," *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995), *cert. denied,* 518 U.S. 1005 (1996), and are cognizable under the ATCA. As the courts have

recognized, these acts "are qualitatively different from other types of violations of international law . . . [since they] constitute behavior manifestly in violation of the most basic rules of international law and, indeed, of civilized conduct." 244 F. Supp.2d at 306.[13]

International religious persecution and religious discrimination have been condemned by the community of nations at least since the early days of the twentieth century[14] and recent U.S. foreign policy statements recognize religious freedom as a fundamental, universally recognized, human right.[15] Amici strongly support the use of the ATCA as a

13. Accord: *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied,* 513 U.S. 1126 (1995) ("*Marcos II*") (violations cognizable under ATCA limited to violations of international norms which are "specific, universal and obligatory").

14. In the aftermath of World War I and the creation of many new boundaries in Europe, the community of nations entered into various treaties enshrining minority rights (both ethnic and religious) as part of customary international law. *See, e.g.*, Treaty Between the Allied and Associated Powers and Poland (Protection of Minorities), reprinted in 1 *International Legislation* (Washington: Carnegie Endowment for International Peace, 1931) at 283-299.

15. The State Department recently recognized religious freedom as a right protected by customary international law:

> Though it is a priority of the United States, religious freedom is by no means our exclusive preserve. The past century in particular has seen a growing recognition by the international community of the universal nature of religious freedom and other fundamental human rights. This awareness has come at no small cost, borne as it was out of the hard lessons wrought by destructive ideologies, colonialism, and world war. Distilled from such suffering came a new appreciation for a common human nature that transcends cultural, racial, religious and other distinctions. *This was exemplified in the 1948*

(Cont'd)

means to seek remedies in the courts consistent with United States foreign policy initiatives condemning violent religious persecution. This has not opened, and will not open, a flood gate of litigation in the U.S. in every instance where religious intolerance exists because the ATCA only provides remedies for violation of a narrow class of specific, universal and obligatory norms of international law, e.g., genocide, war crimes, extrajudicial murder, slavery, torture and other crimes against humanity. *Kadic*, 70 F.3d at 239; *Marcos II*, 25 F.3d at 1475.

The United States Commission on International Religious Freedom is an independent agency established to monitor religious freedom in other countries and to advise the President, the Secretary of State and Congress on how best to promote and protect religious freedom.[16]

(Cont'd)

> *Universal Declaration of Human Rights and reaffirmed in the International Covenant on Civil and Political Rights and other seminal treaties. These and other agreements make clear the overwhelming consensus of the world's nations that religious freedom is endowed in all persons and should be enjoyed by all.* This common agreement among the nations forms an effective basis for common action. The United States remains committed to advancing religious freedom by working with like-minded nations around the world. Though differences may persist on other issues in the international arena, protecting the freedom to believe and worship provides a meaningful cause for which we can work together. We have many partners in this cause and will continue to work diligently to find many more.

U.S. Dep. of State, *International Religious Freedom Report*, 2003, at 1-2, available at *http://www.state.gov/g/drl/rls/irf/2003* (last visited Feb. 18, 2004) (emphasis added).

16. International Religious Freedom Act of 1998, 22 U.S.C. § 6401 (1998). Before the passage of this law, the State Department

(Cont'd)

The USCIRF's activities have, in part, played a role in documenting violations of customary international law and formulating United States policy responses.

Among other activities, the USCIRF visits foreign countries to assess the status of religious persecution and takes testimony from alleged victims. Where the Commission concludes that a country has engaged in or tolerated particularly severe violent abuses of religious freedom that has risen to the level of being "systemic, ongoing and egregious," the Commission may apply the designation of a "countries of particular concern." *See* 22 U.S.C. § 6442(b)(1)(A).

Sudan provides a particularly compelling example of a country designated as being "of particular concern." In 2000, the USCIRF cited Sudan for its systematic use of violence against the non-Muslim southern areas of the country. In 2002, the Commission concluded that:

> the government of Sudan [is] the world's most violent abuser of the right to freedom of religion and belief. The Commission also found that religion is a major factor in Sudan's ongoing civil war, and that religious persecution by the Khartoum regime is intertwined with other human rights and humanitarian violations in Sudan, including aerial bombardment of civilians and of humanitarian facilities, deliberate denial of international humanitarian assistance, abduction of women and children into conditions of slavery,

(Cont'd)

would regularly include information on religious persecution in its country-by-country human rights reports. The 2002 and 2003 USCIRF Annual Reports and country-specific reports are available at *www.uscirf.gov*. (last visited Feb. 25, 2004).

and the forcible displacement of populations from oil-producing areas.

USCIRF, 2002 Annual Report on Sudan, at 1.[17]

It was these types of systematic, egregious violations that led *amicus* Presbyterian Church of Sudan to bring its action under the ATCA. *See*, 244 F.Supp. 2d. at 289. And it is these types of systematic violations that make the ATCA an appropriate and necessary statute.

The instant case involves a violation of the prohibition against arbitrary arrest and detention which the Ninth Circuit concluded had achieved the status of a "clear and universally recognized norm." *Alvarez-Machain v. United States*, 331 F.3d 604, 620 (9th Cir. 2003). The court reached its conclusion since "[t]his prohibition is codified in every major comprehensive human rights instrument and is reflected in at least 119 national constitutions." *Id.*

Petitioner's argument goes beyond challenging the specific decision in this case with respect to the prohibition against arbitrary arrest and detention and constitutes a frontal assault on the use of the ATCA to provide a cause of action for any claim by an alien for violation of the law of nations. Such a result, *amici* believes, would signal a retreat from the rule of law and abandonment of Congress' 200 year-old commitment to deny sanctuary to *hostis humani generis*. Indeed, Petitioner seeks to repeal a statute which hundreds of thousands of victims of genocide, war crimes, extrajudicial murder, slavery, torture and other crimes against humanity are depending upon as their last, best hope for justice.

---

17. The Sudan Peace Act, 50 U.S.C. § 1701 note, condemns Sudan as a terrorist state and includes findings that Sudan has engaged in violations of basic human rights, including genocide.

II. *The Courts Typically Construe the ATCA Narrowly and Limit its Application to Universally Recognized Violations of International Law.*

In 1789, Congress gave federal courts a central role in providing remedies for torts in violation of customary international law. The First Congress prepared the way for the United States entry into the community of nations by acceding to postulates of customary international law and barring perpetrators from ever taking sanctuary here. In its wisdom, Congress chose to express that sentiment in the broadest possible terms, referring generally to the "law of nations" as it may evolve, rather than specific offenses against that law as it then existed, such as piracy. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Kadic v. Karadzic*, *supra*. In this regard, the ATCA can be viewed as an international counterpart to the Eighth Amendment, which broadly prohibited the imposition of "cruel and unusual punishment," rather than enumerate the specific punishments the framers viewed as unconscionable. Just as the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), the ATCA does the same with respect to new benchmarks in customary international law.

An examination of the scope of the violations alleged in ATCA cases provides ample illustration of this point.

a. ATCA provided the primary basis for cases against private German and Austrian entities for slave labor and forced labor claims arising from the Holocaust. These cases were resolved for the benefit of millions of survivors who had never received one penny of compensation from the corporations that collaborated with and benefitted from Nazi racial policies. According to then Deputy Secretary of the Treasury, Stuart Eizenstat, the class action cases filed against

German companies by Holocaust survivors under the ATCA were principally responsible for launching the international negotiations that ultimately resulted in the establishment of a German Foundation to collect funds from culpable private companies for disbursement to victims of Nazi era violations of international law.[18]

Although the Holocaust-related cases were ultimately resolved by settlement, one such case analyzed the applicability of the ATCA. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J.1999). There, the court rejected the same argument made by Petitioner herein that the ATCA provided only jurisdiction but not a cause of action for plaintiff's claim of slavery in violation of the law of nations. Rather, the court chose to follow the "majority" view that the ATCA "provides both subject matter jurisdiction and a cause of action for claims alleging violations of customary international law." *Id.* at 441. To a significant extent, the court relied on the enactment of the *Torture Victim Protection Act*, 106 Stat. 73, codified at 28 U.S.C. § 1350 (note), and the related legislative history which demonstrated an endorsement of existing case law which found the ATCA to

18. We must be frank. It was the American lawyers, through the lawsuits they brought in U.S. courts, who placed the long-forgotten wrongs by German companies during the Nazi era on the international agenda. It was their research and their work which highlighted these old injustices and forced us to confront them. Without question, we would not be here without them . . . For this dedication and commitment to the victims, we should always be grateful to these lawyers."

Remarks of Stuart E. Eizenstat, Deputy Secretary of the Treasury, on July 17, 2000, at the signing of the international agreements establishing the German Foundation "Remembrance, Responsibility and Future."

supply both jurisdictional and a substantive cause of action for claims asserting violations of customary international law.

> This Court concludes that if Congress had disagreed with the courts' finding of a private right of action under the ATCA, Congress could have, and likely would have, amended the ATCA to reflect its intent. Further, the "committed in violation" language of the [ATCA] suggests that Congress did not intend to require an alien plaintiff to invoke a separate enabling statute as a precondition to relief under the [ATCA].

67 F. Supp.2d at 443, citing *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir.), *cert. denied*, 519 U.S. 830 (1996).

b. The ATCA provided the primary basis for litigation against former Philippine dictator Ferdinand Marcos by persons who had been tortured and killed by his repressive military regime. *See Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert denied*, 513 U.S. 1126 (1995). This litigation resulted in a default judgment against the Marcos Estate. Without ATCA this result could not have been achieved.

c. The ATCA provides the primary basis for litigation against Royal Dutch Petroleum Co. and Shell Transport and Trading p.l.c., for their alleged involvement in the torture and summary execution of Nigerian author Ken Saro-Wiwa. *Wiwa, supra*.

d. The ATCA currently provides the basis for litigation against Talisman Energy, Inc., for its alleged involvement in war crimes and genocidal acts against hundreds of thousands of Christian and other non-Muslim civilians in southern Sudan who have been forcibly displaced, killed or maimed

by a systematic pattern of helicopter gunship attacks, high altitude bombings and infantry attacks intended to clear civilians from the oil concessions in southern Sudan. These victims' only offense were their religious or ethnic backgrounds, and the fact that their tribal homelands were located in or around commercial oil concessions containing hundreds of millions of barrels of oil reserves. *Presbyterian Church of Sudan, supra*. As the court there noted:

> These types of acts alleged in the Amended Complaint are qualitatively different from other types of violations of international law. The Amended Complaint is rife with accusations [against defendants] which, if proven true, would constitute behavior manifestly in violation of the most basic rules of international law and, indeed, of civilized conduct. Such acts violate peremptory norms, or *jus cogens*. . . . Violations of *jus cogens* norms constitute violations of obligations owed to all.

Id. at 306 (citations omitted).

The court also noted that Talisman's commercial profit motive was not sufficient to shield it from liability under international law:

> . . . Talisman claims that it could not have committed war crimes because the Amended Complaint alleges that the acts it committed were "directed specifically at furthering its oil operations." . . . However, the fact that the desired end of Talisman's acts was the extraction of oil is irrelevant if it employed means that violated the law of nations. Plaintiffs, while noting that Talisman's primary interest was in oil extraction,

not in "ethnic cleansing" allege that Talisman willingly worked with Sudan to commit acts of "ethnic cleansing" as a means of securing the oil supply:

> Defendants have collaborated in a joint strategy to deploy military forces in a brutal ethnic cleansing campaign against a civilian population based on their ethnicity and/or religion for the purpose of enhancing Defendants' ability to explore and extract oil from areas of southern Sudan by creating a *cordon sanitaire* surrounding the oil concessions located there . . .

The fact that the allegedly unlawful acts also generated oil revenue does not mean they were not war crimes.

244 F. Supp.2d at 326-327 (citations omitted).

Petitioner and supporting amici complain that the lower court's well settled interpretation of the ATCA may result in the filing of frivolous cases. The blanket immunity from suit that the Petitioner and supporting amici suggest as a remedy would unnecessarily extinguish the legitimate claims of hundreds of thousands of victims of genocide, war crimes, and other crimes against humanity. Petitioner has made no showing to justify such a draconian result. The well established federal procedural rules that protect the courthouse from frivolous litigation in anti-trust, securities and other complex civil cases, are more reasonable safeguards particularly where, as here, victims with valid claims have no alternative forum.[19]

19. F.R.C.P. 11

In addition, daunting procedural and substantive hurdles constitute formidable deterrents to bringing ATCA cases with little or no merit. ATCA actions have been dismissed on the basis of statute of limitations[20], forum non conveniens[21], sovereign immunity[22], political question[23], and state

20. *Deutsch v. Turner Corp.*, 324 F.3d 692, 717 (9th Cir.), *cert. denied*, 124 S.Ct. 105 (2003) (Statute of limitations under the ATCA is 10 years, as limitations period was adopted from analogous Torture Victim Protection Act (TVPA), 28 U.S.C.A. § 1350 note). Plaintiffs brought actions against German and Japanese corporations, alleging that plaintiffs were forced to work as slave laborers during the Second World War and seeking damages and other remedies for lost wages and other atrocious injuries suffered. Court found that plaintiffs brought their claims far too late.

21. *Flores v. Southern Peru Copper Corp.*, 253 F. Supp.2d 510, 544 (S.D.N.Y. 2002), *affirmed*, 343 F.3d 140 (2d Cir. 2003) (court stated in dicta that it would have dismissed ATCA action on grounds of forum non conveniens but held that it did not have jurisdiction in the first instance). Peru residents brought personal injury claims against American company, alleging that environmental pollution from company's Peru mining operations caused their asthma and lung disease, and asserting federal jurisdiction under ATCA. Court held, inter alia, that Peru was adequate alternate forum.

22. *In Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989), the Supreme Court dismissed the plaintiffs' claims on sovereign immunity grounds, holding that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-11, bars most suits against foreign sovereigns, including those brought under the ATCA. *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 152 (2nd Cir. 2003).

23. While the policy interests articulated in the Statement of Interest do not in and of themselves provide an independent legal basis for dismissal, the long-standing foreign policy commitment to resolving claims arising out of World War II and the Holocaust at a governmental level does provide such a basis.

(Cont'd)

action.[24] In addition, the requirement of establishing personal jurisdiction limits the universe of potential ATCA defendants to perpetrators found within the United States and vanquishes the notion that the ATCA constitutes an untoward exercise of extraterritorial jurisdiction.[25] While our country has traditionally served as a refuge for victims of human rights abuses, it has been the explicit policy of Congress since 1789 that we provide no sanctuary for violators.

Moreover, ATCA allegations are limited to the narrow set of claims that fit within the statutory category of a tort in violation of "the law of nations." Courts have been capable of distinguishing those few instances that fit this narrow

(Cont'd)

If the Court were to allow this action to continue, it would run afoul of the political question doctrine as articulated in Baker.

In re Nazi Era Cases Against German Defendants Litigation, 129 F.Supp.2d 370, 382 (D. N.J. 2001) .

24. The court notes that the same separation of powers principles that inform the act of state doctrine underlie the political question doctrine. *See First Nat. City Bank v. Banco National de Cuba*, 406 U.S. 759, 785-93 (1972) (Brennan, J., dissenting) (noting that the act of state doctrine, as articulated in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), is equivalent to the political question doctrine); *Trajano v. Marcos*, 1989 WL76894, *2 (9th Cir. July 10, 1989) (Unpub. Disp.) ("The act of state doctrine is the foreign relations equivalent of the political question doctrine"). *Sarei v. Rio Tinto p.l.c.*, 221 F. Supp.2d 1116, 1196 (C.D. Cal. 2002); *Burger-Fisher v. DeGussa AG*, 65 F. Supp.2d 248 (D.N.J. 1999) (allegations of complicity in Jewish slave labor during the Holocaust).

25. *See Dardana Ltd. v. A.O. Yuganskneftegaz*, 317 F.3d 202 (2d Cir. 2003); *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446 (3d Cir. 2003); *World Tankers Carriers Corp. v. My Ya Mawlaya*, 99 F.3d 717 (5th Cir. 1996). F.R.C.P. 4(k)(2).

definition from those circumstances that do not. *See, e.g., Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000) (allegations of discriminatory expropriation of Jewish property in Egypt, while "reprehensible," were not actionable under the Act); *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003) (environmental devastation does not violate the law of nations); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) ("cultural genocide" is not actionable under ATCA); *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (First Amendment claims cannot be brought under ATCA); *Aldana v. Fresh Del Monte Produce, Inc.*, 2003 U.S. Dist. LEXIS 24343 (S.D. Fl. Dec. 12, 2003) (short term detention, psychological coercion and death threats do not constitute violations of international law).

By contrast, the decisions which have allowed the ATCA claims to proceed each involve violations of the specific, universal and obligatory rights comprising "customary international law," such as genocide and war crimes, *Presbyterian Church of Sudan, supra,* crimes against humanity, *Wiwa v. Royal Dutch Petroleum Co., supra.*, and torture, *Abebe-Jira v. Negewo, supra.*

Due to the narrow interpretation of the ATCA by the lower courts this is not an area of litigation where the flood gates have opened. For the relatively rare circumstances where ATCA claims have survived initial scrutiny federal courts provide an impartial forum with extensive due process guarantees for both victims and alleged violators of customary international law. In many cases, courts have recognized that the federal judicial forum is the only option available to the victims.

III. *Federal Courts Provide a Forum Where No Independent Judiciary Exists To Adjudicate Egregious Violations of International Law*

It is not a coincidence that most ATCA plaintiffs are citizens of countries dominated by military dictators or ruling elites who do not tolerate independent, functioning judiciaries. The ATCA has not been invoked by citizens of democratic countries such as Australia, Switzerland or the United Kingdom – who have filed an amicus brief in support of the petitioner – because their national institutions support independent judiciaries capable of fairly resolving ATCA type claims.[26] The ATCA provides a forum of last resort for the adjudication of claims of disenfranchised victims living outside the world of industrialized democracies: Sudanese victims of state sponsored genocide, *Presbyterian Church of Sudan*, 244 F. Supp.2d at 325; Phillipino victims of extradjudicial murder, *Marcos II*, 25 F.3d at 1475; and Bosnian victims of state-sponsored religious and ethnic persecution *Kadic*, 70 F.3d at 239. These victims have no viable judicial forum for the adjudication of their claims in the absence of the ATCA.[27] The Second Circuit in *Wiwa*

26. Under federal precedent ATCA cases brought by the citizens of Australia, Switzerland or the United Kingdom would have difficulty surviving a forum non conveniens motion. *See, e.g., Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

27. For example, under Islamic law in the Sudan, members of the Presbyterian Church of Sudan and other southern Sudanese victims have reduced legal rights.

> These reduced rights include a a total lack of legal personality for plaintiffs who practice traditional African religions, and diminished testimonial competence for Christians. . . . [I]t would be rather surprising if the government of Sudan conducted a war of "ethnic cleansing" against plaintiffs and at the same time granted

(Cont'd)

cogently analyzed the conundrum faced by victims of international rights violations:

> One of the difficulties that confront victims of torture under color of a nation's law is the enormous difficulty of bringing suits to vindicate such abuses. Most likely, the victims cannot sue in the place where the torture occurred. Indeed, in many instances, the victim would be endangered merely by returning to that place. It is not easy to bring such suits in the courts of another nation. Courts are often inhospitable. Such suits are generally time consuming, burdensome, and difficult to administer. In addition, because they assert outrageous conduct on the part of another nation, such suits may embarrass the government of the nation in whose courts they are brought. Finally, because characteristically neither the plaintiffs nor the defendants are ostensibly either protected or governed by the domestic law of the forum nation, courts often regard such suits as 'not our business.'

Wiwa, 226 F.3d at 106.

Countries such as Australia, Switzerland, and the United Kingdom are free to choose whether to open their court systems to claims of violation of customary international law. The United States Congress made that judgment in the

---

(Cont'd)

> them a fair judicial process to remedy those injuries. In addition, it would be perverse, to say the least, to require plaintiffs to bring this suit in the courts of the very nation that has allegedly been conducting genocidal activities to try to eliminate them.

Presbyterian Church of Sudan, 244 F. Supp.2d at 336.

affirmative at the founding of the nation more than 200 years ago when it enacted the ATCA and denied safe harbor to *hostis humani generis*.

This Court has the historic opportunity to affirm the well settled interpretation of the ATCA formulated in the lower courts. In so doing, this Court will serve the United States' strong interest in protecting international religious freedom, preserve the fundamental rights of individuals in civilized society and promote freedom, democracy and accountability in the international community.

CONCLUSION

For the reasons stated herein, the decision below, that the ATCA provides a basis for redress of violations of customary international law, should be affirmed.

Respectfully submitted,

LAWRENCE KILL
LINDA GERSTEL
ANDERSON KILL & OLICK, P.C.
1251 Avenue of the Americas
New York, NY 10020
(212) 278-1000

CAREY R. D'AVINO*
STEPHEN A. WHINSTON
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

* *Counsel of Record*

Counsel for Amici Curiae